IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

United States of America,
Ex Rel. Dale Thomas Vosika
and Rob Thompson,

Plaintiffs,

vs.

Starkey Laboratories, Inc.,

Defendant.

Case No. 01-709 DWF/SRN

ANSWER

INTRODUCTION

Defendant Starkey Laboratories, Inc. ("Starkey"), for its Answer to the Second Amended Complaint ("Complaint") of Plaintiffs Dale Thomas Vosika and Rob Thompson states and alleges as follows:

Starkey generally denies each and every matter, thing and allegation contained in Plaintiffs' Complaint, except as specifically admitted, qualified or otherwise answered.

Starkey expressly and specifically denies each and every one of Plaintiffs' allegations that a corporate conspiracy or scheme was either formulated or operated either to sell hearing aids to non-government customers for prices, terms and conditions more favorable than those negotiated with the Department of Veterans Affairs ("VA"), or to avoid obligations under its 1994 Custom Hearing Aid Contract ("1994 Contract") with the VA.

ANSWERS TO ITEMIZED ALLEGATIONS

1. With respect to the allegations contained in paragraph 1 of Plaintiffs' Complaint, Starkey admits that this Court has jurisdiction over matters brought pursuant to the Federal False Claims Act, 31 U.S.C. § 3729 *et seq.*, but is without sufficient knowledge, information or belief

at this stage of the proceedings to admit or deny whether a factual basis exists to bar this action pursuant to the provisions of 31 U.S.C. §3730(e).

2. With respect to the allegations contained in paragraph 2 of Plaintiffs' Complaint, Starkey admits that Plaintiffs have requested a jury trial. Starkey denies, however, that by the conclusion of pretrial proceedings in this matter that Plaintiffs will necessarily be entitled to a jury trial.

3. With respect to the allegations contained in paragraph 3 of Plaintiffs' Complaint, Starkey admits that Rob Thompson has been employed by Starkey since April 1991 in various capacities and with various responsibilities. Starkey denies, however, that Thompson has not been responsible for setting prices or policies during the term of the 1994 Contract and further denies that he had no control over the sales methods or pricing practices of Starkey.

4. With respect to the allegations contained in paragraph 4 of Plaintiffs' Complaint, Starkey admits that Dale Vosika was employed by Starkey from September 1979 through September 1999 in various capacities and with various responsibilities. Starkey also admits that Vosika was not responsible for setting prices or policies, and had no control over sales methods or pricing practices. Starkey denies that Vosika, in his position as Director of Facility Services, had rightful access to all Starkey's sales information, as alleged in Paragraph 4.

5. Starkey admits the allegations contained in paragraph 5 of Plaintiffs' Complaint.

6. With respect to the allegations contained in paragraph 6 of Plaintiffs' Complaint, Starkey admits that it sells multiple types of hearing aid products, in multiple and customized configurations within each type. Starkey also admits that five (5) types of hearing aids were included in the 1994 Contract, but affirmatively alleges that each and every hearing aid sold to the VA was a unique and customized product depending upon such things as its type of circuitry and design features.

7. Starkey admits the allegations contained in paragraph 7 of Plaintiffs' Complaint, except to state that the effective date of the amendment extending the 1994 Contract to September 30, 1997, was February 9, 1996, and that the titles of Richard Handberg, who died on April 9, 2002, were Director of Warranty Services, Government Services & Battery Division.

8. With respect to the allegations contained in paragraph 8 of Plaintiffs' Complaint, Starkey only admits that its 1994 Contract with the VA includes a boilerplate price reduction clause, and that the General Services Administration ("GSA") has delegated authority to the VA to award and administer Multiple Award Schedule ("MAS") contracts. Starkey denies Plaintiffs' allegations about the 1994 Contract negotiation between Starkey and the VA and the purpose set forth for the VA to enter into the terms of the 1994 Contract. Starkey also denies Plaintiffs' allegations regarding the purpose and effect of the Price Reduction Clause. Because the requirements of both MAS contract negotiation and price reduction are governed by rule and regulation, they are matters of law to which Starkey has no obligation to respond by way of Answer.

9. With respect to the allegations contained in paragraph 9 of Plaintiffs' Complaint, Starkey denies that the pricing, terms and conditions as set forth constitute the full pricing, terms and conditions for sale of Starkey's hearing aids to the VA under the 1994 Contract.

10. With respect to the allegations contained in paragraph 10 of Plaintiffs' Complaint, Starkey admits that it typically extended first-year warranties on hearing aids to customers at no charge and that there typically was a charge for second-year warranties. Starkey also admits that the 1994 Contract includes the provision cited regarding second-year warranties, and that the prices set forth in paragraph 9 of Plaintiffs' Complaint includes the cost of the second-year warranty. Starkey denies Plaintiffs' assumption that there is any specific price for a hearing aid that can be separable from the entire set of terms and conditions of any individual sale, and

further denies the resulting assumption that the 1994 Contract price of the VA hearing aids would have any specific dollar reduction in the absence of a second-year warranty because these assumptions are speculative, improper and beyond proof.

11. With respect to the allegations contained in paragraph 11 of Plaintiffs' Complaint, Starkey denies that any pleaded price alone represents the pricing, terms and conditions of sales to the VA during the 1994 Contract.

12. With respect to the allegations contained in paragraph 12 of Plaintiffs' Complaint, Starkey admits that it sold to the VA all five types of the hearing aids under the 1994 Contract, that the VA had multiple accounts, and that the largest number of sales to the VA occurred in account #G0100. Starkey is without sufficient information, knowledge or belief as to whether Exhibit 1 to Plaintiffs' Complaint accurately sets forth all sales that occurred in account #G0100, and therefore denies the same, putting Plaintiffs to their strictest proof. Starkey is without sufficient information, knowledge or belief about which records are within Plaintiffs' possession or Plaintiffs' beliefs as to the number of sales made to the VA in accounts other than G0100.

13. With respect to the allegations contained in paragraph 13 of Plaintiffs' Complaint, Starkey affirmatively states that the terms of the 1994 Contract speak for themselves and whether it is a fixed-price contract is irrelevant to this action. Furthermore, because the nature of the 1994 Contract and obligations thereunder are governed by rule and regulation, they are matters of law to which Starkey has no obligation to respond by way of Answer.

14. Starkey admits the allegations contained in paragraph 14 of Plaintiffs' Complaint.

15. With respect to the allegations contained in paragraph 15 of Plaintiffs' Complaint, Starkey denies that it has failed to make rebates to the VA and that price reductions occurred during the 1994 Contract term which created any contractual entitlement to rebates.

16. With respect to the allegations contained in paragraph 16 of Plaintiff's Complaint, Starkey admits that during the 1994 Contract term, William Austin was the sole owner of Starkey, Jerry Ruzicka was the Vice President of Manufacturing and later President, Jim Bremer was Vice President of Credit, and Dick Handberg was Director of Warranty Services, Government Services & Battery Division and that he negotiated prices with the VA and signed the 1994 Contract and its extension. Starkey also admits that Plaintiffs have accurately named various managing directors and sales representatives who were employed by Starkey during the 1994 Contract. Starkey denies Plaintiffs' allegations regarding Austin's intent, business strategies, and day-to-day role in company operations. Starkey denies the allegations regarding the responsibilities and authority of the managing directors and sales representatives, as well as the assumptions about pricing approvals, which as pleaded are speculative, improper and beyond proof.

17. With respect to the allegations contained in paragraph 17 of Plaintiffs' Complaint, Starkey admits that during the 1994 Contract it sold hearing aids to many different customers, including those specifically named therein. Starkey also admits that Cary Dawson, as a sales representative, was obligated to report to his managing director, Frank Ring, and that Ring was obligated to report to Austin. Starkey admits that Ring and Dawson had individual responsibilities for negotiating pricing with customers, including Evans Hearing Aid Centers ("Evans") and Trinity Hearing Aid Company ("Trinity"). Starkey denies that Ring and Dawson had unlimited authority with respect to customer pricing as is suggested by paragraph 17. Finally, Starkey admits that Mike Reha was a credit representative and that one of his duties was to enter customer pricing into Starkey's computer system.

18. Starkey denies the allegations contained in paragraph 18 of Plaintiffs' Complaint, including the allegations that its discount programs were designed with any improper purpose or

to avoid contractual obligations to the VA. Starkey denies that its discount programs constituted a scheme or that they were designed or operated to deliberately make Starkey pricing difficult to understand.

19. With respect to the allegations contained in paragraph 19 of Plaintiffs' Complaint, Starkey admits only that it sold hearing aids to Trinity prior to October 4, 1994. Starkey denies that it engaged in any conspiracy or scheme to defraud Blue Cross. Starkey is without sufficient information, knowledge or belief as to the allegations concerning the business dealings among Trinity, the United Steel Workers of America, and Blue Cross, as well as any conversations between Jim Bremer and Rob Thompson in late 1995, and therefore denies the same, putting Plaintiffs to their strictest proof. Starkey affirmatively states and alleges that the allegations set forth in paragraph 19 are irrelevant as to Plaintiffs' claims here.

20. With respect to the allegations contained in paragraph 20 of Plaintiffs' Complaint, Starkey admits that it offered certain of its customers, including Trinity, actual and quantity discounts, some of which appeared on invoices at the end of each 28-day sales cycle. Starkey denies any implication in this paragraph that its discount programs were in any way improper or part of any scheme to avoid the 1994 Contract, and Starkey disclosed the fact of such discounts during its price negotiation with the VA.

21. With respect to the allegations contained in paragraph 21 of Plaintiffs' Complaint, Starkey admits that during the term of the 1994 Contract, it conducted cross-marketing programs designed to increase its hearing aid sales, and that these programs were often referred to as tanking programs. Starkey denies that the cross-marketing programs were tied in any way to its "most favored customers" and further denies that during the 1994 Contract period that either the VA or Starkey designated any Starkey customers as "most favorite customers." Starkey admits that the VA did not participate in Starkey's tanking programs, but specifically denies any

implication in this paragraph that its tanking programs were in any way improper or part of any scheme to avoid the 1994 Contract. Furthermore, Starkey disclosed the fact of its tanking program during its price negotiation with the VA .

22. Starkey denies the allegations contained in paragraph 22 of Plaintiffs' Complaint, except to admit that it had a battery tank program in which the VA did not participate, which program was specifically disclosed to the VA during price negotiations.

23. Starkey denies the allegations contained in paragraph 23 of Plaintiffs' Complaint, except to admit that it had an equipment tank program in which the VA did not participate and that its tanking programs were known amongst Starkey's employees and customers. Starkey denies that its equipment tank program resulted in more favorable pricing, terms and conditions than those under the 1994 Contract, and denies that its equipment tanking program was tied in any way to "most favored customers." Starkey denies that during the 1994 Contract, either it or the VA designated any customers as "most favored customers." Starkey is without sufficient information, knowledge or belief as to documents within Plaintiffs' possession or conversations alleged to have occurred between Thompson and Reha and therefore denies the same, putting Plaintiffs to their strictest proof. Starkey specifically denies that the intent of its tanking program was to avoid its obligations under the 1994 Contract and that any of its employees had authority to utilize the cross-marketing program for that purpose.

24. With respect to the allegations contained in paragraph 24 of Plaintiffs' Complaint, Starkey admits that Mike Reha was a credit representative for Starkey. Starkey denies that Reha had authority to implement any pricing contrary to company policy. Starkey admits that the 1994 Contract began on October 1, 1994, and that Starkey had a prior contract with the VA to sell hearing aids. Starkey is without sufficient information, knowledge or belief with respect to the allegations concerning whether Starkey's customers were confused by its discount programs

to the extent that they could not determine the price being paid for hearing aids, and therefore denies the same, putting Plaintiffs to their strictest proof. Starkey denies that it had knowledge during the 1994 Contract negotiations with the VA, at its signing, and during its term, that the pricing, terms, and conditions for purchases by Trinity were better than the pricing, terms, and conditions for the VA. Starkey further denies that any sales of hearing aids made to Trinity violated the terms of the 1994 Contract. Starkey denies that Exhibits 2 and 3 to Plaintiffs' Complaint, if taken in proper context, in any way relate to an effort to avoid the 1994 Contract.

25. With respect to the allegations contained in paragraph 25 of Plaintiffs' Complaint, Starkey denies that any single price reflects the pricing, terms and conditions of its sales to any given customer, including Trinity and the VA, and further denies that the alleged pricing comparison set forth in paragraph 25 properly compares the relationship between Starkey and Trinity with the relationship between Starkey and the VA .

26. Starkey is without sufficient information, knowledge or belief as to the allegations contained in paragraph 26 of Plaintiffs' Complaint, and therefore denies the same, putting Plaintiffs to their strictest proof. Starkey specifically denies that it was aware of any sales being made to its customers on better pricing, terms and conditions than the VA received under the 1994 Contract. Starkey also specifically denies that any sales of hearing aids to other customers violated the terms of the 1994 Contract.

27. Starkey denies all allegations of conspiracy, schemes, and efforts to deceive or defraud the VA as contained in paragraph 27 of Plaintiffs' Complaint, and all allegations that Handberg conducted himself in any way other than to ensure VA contract compliance, including his use of a computer program to attempt to monitor pricing of sales during the 1994 Contract term.

28. With respect to the allegations contained in paragraph 28 of Plaintiff's Complaint, Starkey admits only that it had in excess of 6,000 active accounts during the term of the 1994 Contract. Starkey is without sufficient information, knowledge or belief as to the remainder of the allegations contained in paragraph 28 of Plaintiffs' Complaint, and therefore denies the same, putting Plaintiffs to their strictest proof. Starkey affirmatively states and alleges that the chart set forth by Plaintiffs' in conjunction with the allegations of Paragraph 28 does not constitute a Starkey document and does not reflect a proper method of comparing the pricing, terms and conditions of sales to the VA with pricing, terms and conditions of sales of other commercial customers. Starkey specifically denies that its sales to Trinity violated the terms of the 1994 Contract.

29. With respect to the allegations contained in paragraph 29 of Plaintiffs' Complaint, Starkey admits only that Evans received certain discounts and participated in Starkey's cross-marketing program. Starkey is without sufficient information, knowledge or belief as to the remainder of the allegations contained in paragraph 29 of Plaintiffs' Complaint, and therefore denies the same, putting Plaintiffs to their strictest proof. Starkey affirmatively states and alleges that the chart set forth by Plaintiffs in conjunction with the allegations of Paragraph 29 does not constitute a Starkey document and does not constitute a proper method of comparing pricing, terms and conditions of sales to the VA with pricing, terms and conditions of sales to other customers. Starkey specifically denies that its sales to Evans violated the terms of the 1994 Contract.

30. With respect to the allegations contained in paragraph 30 of Plaintiff's Complaint, Starkey admits only that it had in excess of 6,000 active accounts during the term of the 1994 Contract. Starkey is without sufficient information, knowledge or belief as to the remainder of the allegations contained in paragraph 30 of Plaintiffs' Complaint, and therefore denies the same,

putting Plaintiffs to their strictest proof. Starkey affirmatively states and alleges that the chart set forth in conjunction with the allegations of Paragraph 30 does not constitute a Starkey document and does not constitute a proper method of comparing pricing, terms and conditions of sales to the VA with pricing, terms and conditions of sales to other customers. Starkey specifically denies that its sales to the customers listed therein violated the terms of the 1994 Contract and further denies that there were pervasive sales to customers that violated the terms of the 1994 Contract.

31. With respect to the allegations contained in paragraph 31 of Plaintiffs' Complaint, Starkey admits that it offered loans to certain of its customers, reflected in advanced purchase agreements, and affirmatively alleges that the contract attached as Exhibit 4 speaks for itself. Customers to whom Starkey provided either loans or financing were obligated to repay all loans and financing. Starkey denies that it engaged in any scheme to evade the requirements of the 1994 Contract or that the transaction reflected in Exhibit 4 resulted in a violation of the 1994 Contract.

32. With respect to the allegations contained in paragraph 32 of Plaintiffs' Complaint, Starkey affirmatively alleges that the contract attached as Exhibit 5 speaks for itself, and constitutes a loan or financing transaction with a customer, who was obligated to repay to Starkey the amounts advanced. Starkey denies that it engaged in any scheme to evade the requirements of the 1994 Contract or that the contract resulted in a violation of the 1994 Contract.

33. Starkey denies the allegations set forth in paragraph 33 of Plaintiffs' Complaint, including all allegations relating to schemes and efforts to defraud the VA. Starkey denies also the allegations that the Price Reduction Clause under the 1994 Contract required or entitled the VA to any rebates, and alleges that the price reduction provisions of the 1994 Contract are

governed by rule and regulation, and that allegations pertaining thereto are matters of law and need not be responded to by Starkey by way of Answer. Starkey further denies that the enumerated billings, or any one of them, constitute false or fraudulent claims by Starkey. By virtue of this Court's prior ruling, all billings prior to April 24, 1995 are untimely pleaded; further, any such billings subsequent to the termination of the 1994 Contract are also outside the scope of this litigation.

34. Starkey denies the allegations as set forth in paragraph 34 of Plaintiffs' Complaint, inasmuch as the fines and penalties under 31 U.S.C. 3729(a) are not a matter for pleading by Plaintiff, and are awarded only in the event that the Court enters judgment for such amounts.

35. Starkey denies the allegations as set forth in paragraph 35 of Plaintiffs' Complaint, as improperly pleaded as a matter of law.

36. Starkey denies the allegations as set forth in paragraph 36 of Plaintiffs' Complaint inasmuch as fees and costs are not a matter for pleading, and are awarded only in the event that the Court enters judgment for such amount.

AFFIRIMATIVE DEFENSES

37. Defendant herein reserves the right to assert additional affirmative defenses that become known to them during the course of this action.

FIRST AFFIRMATTIVE DEFENSE

38. The Court lacks subject matter jurisdiction over the claims alleged by Plaintiffs.

SECOND AFFIRMATIVE DEFENSE

39. Plaintiffs' Complaint fails to state a claim upon which relief may be granted.

THIRD AFFIRMATIVE DEFENSE

40. Plaintiffs' claims for relief are barred because any actions taken by Starkey with respect to the subject matters alleged in the Complaint were undertaken in good faith and constitute lawful, proper and justified conduct, or at the very most, constitute mistaken or negligent conduct, which is not actionable under 31 U.S.C. 3729 *et seq.*

FOURTH AFFIRMATIVE DEFENSE

41. Plaintiffs' claims for relief are barred because, at the very most, Starkey's alleged conduct under the 1994 Contract was the result of mistake or negligence, which is not actionable under 31 U.S.C. 3729 *et seq.*, which conduct was outweighed by the contributory negligence and fault of the VA contracting and other personnel, both during the negotiation and operation of the 1994 Contract.

FIFTH AFFIRMATIVE DEFENSE

42. Plaintiffs' claims for relief are barred in whole or in part under 31 U.S.C. 3729 *et seq.* on grounds that the alleged conduct is not material within the meaning of the statute.

SIXTH AFFIRMATIVE DEFENSE

43. Plaintiffs' claims for relief relating to the negotiation process for the 1994 Contract are barred under the reasoning of *United States v. Data Translation, Inc.*, 984 F.2d 1256 (1st Cir. 1992).

SEVENTH AFFIRMATIVE DEFENSE

44. The 1994 Contract's Price Reduction Clause is unenforceable and Plaintiffs' claims for relief under the Price Reduction Clause are barred because the 1994 Contract fails to properly and meaningfully identify a Most Favored Customer.

EIGHTH AFFIRMATIVE DEFENSE

45. Plaintiffs' claims for relief are barred because any acts alleged in the Complaint that are found violative of the 1994 Contract were performed in such a manner that Starkey is not vicariously liable for the conduct of those who performed them.

NINTH AFFIRMATIVE DEFENSE

46. Plaintiffs' claims for relief are barred by the doctrine of estoppel, for reason that the VA contracting officers and personnel elected to enter into and operate the 1994 Contract according to the terms set forth, and Starkey acted in reliance on those elections throughout the term of the 1994 Contract.

TENTH AFFIRMATIVE DEFENSE

47. The claims are barred, in whole or in part, by the applicable statute of limitations.

ELEVENTH AFFIRMATIVE DEFENSE

48. Plaintiffs' claims for relief are barred by the doctrine of laches because Plaintiffs did not timely assert their rights, and Starkey is prejudiced by the intervening death of Richard Handberg, which occurred on April 9, 2002.

TWELFTH AFFIRMATIVE DEFENSE

49. Plaintiffs' claims for relief are barred by the doctrine of laches because Plaintiffs did not timely assert their rights, as evidenced by their admitted concerns dating to 1995.

THIRTEENTH AFFIRMATIVE DEFENSE

50. Plaintiffs' claims for relief are barred, in whole or in part, by the Government's failure to mitigate damages.

FIFTEENTH AFFIRMATIVE DEFENSE

51. Plaintiffs' claims are barred in whole or part because Plaintiffs' pursuit of this matter is clearly vexatious and brought primarily for purposes of harassment.

FOURTEENTH AFFIRMATIVE DEFENSE

52. Plaintiffs' claims for relief are barred in whole or in part because the damages and/or penalties sought in this matter, which are above and beyond actual damages, violate the Seventh and Eighth Amendments to the United States Constitution.

WHEREFORE, Defendant Starkey Laboratories, Inc. prays that Plaintiffs take nothing against it by their pretended cause of action, that the same be dismissed with prejudice and that Starkey recover judgment in its favor as well as for its attorneys' fees, costs and disbursements herein.

HALLELAND LEWIS NILAN SIPKINS & JOHNSON, P.A.

Dated: September 22, 2004.

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